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Sivarasa Rasiah v Badan Peguam Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–49 OF 2002
MOKHTAR SIDIN, ALAUDDIN AND ARIFIN JAKA JJCA
24 NOVEMBER 2005

B

Constitutional Law — Fundamental liberties — Freedom of association — Restriction to — Whether exclusion of person who held position in political party from being member of Bar Council was permissible under art 10(2)(c) — Federal Constitution art 10(1)(c) & 2(c) — Legal Profession Act 1976 s 46A

C

Constitutional Law — Fundamental liberties — Freedom of association — Whether include right to manage the association — Whether right to be elected as member of Bar Council a fundamental right — Federal Constitution art 10(1)(c) & 2(c) — Legal Profession Act 1976 s 46A

D

Legal Profession — Malaysian Bar — Bar Council — Membership — Whether exclusion of person who held position in political party from being member of Bar Council inconsistent with right to association — Legal Profession Act 1976 s 46A

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The appellant was a member of the Malaysian Bar ('MB') and was duly elected to thfe Bar Council ('BC') in November 1999 and in two succeeding years, 2000–2001 and subsequently 2002–2003. On 14 July 2001, the appellant was elected the Vice President of the political party, Parti Rakyat Malaysian ('PRM'). He applied for a declaration that: (1) notwithstanding the appellant's appointment as Vice President of PRM on 14 July 2001, he was not disqualified from being a member of the BC in 2001–2002; and (2) a declaration that s 46A (1)(c)(ii) ('the impugned statutory provison') of the Legal Profession Act 1976 ('the Act') — which disqualifies a person who holds any office in any political party from being a member of the Bar Council — was inconsistent with the Federal Constitution ('FC') and was in consequence void. This application was dismissed by the High Court, thus this appeal. The issue was whether the impugned statutory provision offended art 10(1)(c) and/or art 5 of the FC and should therefore be struck down by virtue of art 4, as being null and void.

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Held, dismissing the appeal with costs:

(1) The right to form association under art 10(1)(c) did not arise because the right guaranteed therein is the ordinary right which is enjoyed by all citizens including the appellant to form associations. It bears no reference to a right which is conferred by a particular statute, ie the Act, to serve as a member of the BC, a body which is the creation of the Act itself (see para 15). Hence any conditions imposed by the Act (in this case, the impugned statutory provision) would not amount to a violation of the right to form an association guaranteed under art 10(1)(c) (see para 19).

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(2) The Act did not confer on the appellant a right to be a member of the BC. It only confers a right to stand for election to the BC. The right to stand for election or to be elected to the office of the BC and a political party is not a fundamental right. In other words, the appellant did not have the fundamental right to be a member of the BC which was an elected post. Therefore when he was disqualified from being a member of the BC upon assuming the post of Vice President of PRM ther was no question of his constitutional right being affected (see para 22). Therefore, the right conferred by art 10 (1)(c) to form association implies the right to be a member of the association, but not the right to manage the association (ie by being a member of the MB as opposed to being a member of the BC) (see para 23); Dewan Undangan Negeri Kelantan v Nordin Salleh [1992] 1 MLJ 697 distinguished. Even assuming for a moment that there appears to be a restriction on the appellant's right, the restriction was clearly permitted by the provisions of cl 2(c) of art 10 (see para 25).

(3) A close scrutiny of art 10(1) which begins with '(1) Subject to cll (2), (3) and (4)' — clearly reveals that all the rights mentioned therein are not absolute rights because they are qualified by the clauses mentioned above. In the case of art 10(1)(c) which deals with the right of all citizens to form association, the FC, in art 10(2)(c) authorizes Parliament to impose certain restrictions as it deems necessary in the interest of either the security of the Federation, public order or morality. The impugned statutory provision is indeed the law imposing such restrictions (see para 31). Therefore, even if the impugned statutory provision offended art 10(1)(c) (which the court did not agree), the restriction came well within the purview and scope of cl (2)(c) of art 10. In other words, the impugned statutory provision, being itself a restriction permissible under art 10(2)(c), could not be unconstitutional (see para 62).

(4) The object of the Act and therefore the impugned statutory provision is sufficiently connected and in line with the 'in the interest of morality' purpose mentioned in cl (2) of art 10. So long as it can be shown that the impugned statutory provision is enacted or passed for a purpose related or connected to morality without having to show that it is to maintain morality, it is validly enacted (see para 37). As to the word 'morality' itself, it should be given a broad, liberal and extensive meaning, may be wider than merely good values. However, in the absence of any definition to the word 'morality' in the FC it should be given its ordinary meaning (see para 38). Morality therefore has a wider import of interpretation since ethics cover almost every aspect of the human conduct (see para 39).

(5) Applying the purposive approach, the impugned statutory provision in the Act is to ensure the need for an independent BC free from political influence and thus preventing a potential conflict of interest situation (see para 48). The exclusion of members who hold office in a political party is to avoid the BC from being used as a political platform or to prevent the possible exertion of political influence upon an independent body whose task is to uphold and maintain the objectives as prescribed by the Act (see para 56). The position of the appellant in assuming the dual office both as a member of the BC and a

political party would no doubt bring into question the likelihood of his potential impartiality in discharging his duties and responsibilities as a member of the BC. As long as he continues to serve and hold office in a political party there would invariably arise a suspicion that any policy adopted by the BC could be influenced by the agenda of the political party (see para 59).

[Bahasa Malaysia summary

Perayu adaah seorang ahli Badan Peguam Malaysia ('BPM') dan telah dipilih ke Majlis Peguam ('MP') dalam bulan November 1999 dan dalam dua tahun berturut-turut, 2000–2001 dan berikutnya 2002–2003. Pada 14 Julai 2001, perayu telah dipilih Naib Presiden parti politik, Parti Rakyat Malaysiua ('PRM'). Beliau memohon untuk satu deklarasi bahawa: (1) meskipun [elantikan perayu sebagai Naib Presiden PRM pada 14 Juali 2001, beliau tidak digugurkan daripada menjadi ahli MP dalam tahun 2001-2002; dan (2) satu deklarasi bahawa s 46A(1)(c)(ii) ('peruntukan statutory yang dipersoalkan') Akta Profesyen Undang-Undang 1976 ('Akta tersebut') — yang menggugurkan seseorang yang memegang apa-apa jawatan dalam mana-mana parti politik daripada menjadi ahli Majlis Peguam — adalah tidak konsisten dengan Perlembagaan Persekutuan ('PP') dan mengakibatnya menjadi tidak sah. Permohonan ini telah ditolak oleh Mahkamah Tinggi, olah itu rayuan ini dibuat. Persoalannya adalah sama ada peruntukan statutori yang dipersoalkan bercanggah dengan perkara 10(1)(c) PP dan patut dibatalkan menurut perkara 4, sebagai terbatal dan tidak sah.]

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Hak untuk membentuk persatuan di bawah perkara 10(1)(c) tidak timbul kerana hak yang terjamin itu adalah satu hak biasa yang dinikmati oleh semua warganegara termasuklah perayu untuk membentuk persatuan. Ia tidak merujuk kepada suatu hak yang dibentuk oleh Akta itu sendiri (lihat perenggan 15). Justeru itu, apa-ap syarat yang dikenakan oleh Akta tersebut (seperti dalam kes ini, peruntukan statutory yang dipersoalkan) tidak membentuk satu percanggahan hak untuk membentuk satu persatuan yang dijamin di bawah perkara 10(1)(c) (lihat perenggan 19).

(2) Akta tersebut tidak memberikan perayu hak untuk menjadi ahli MP. Ia hanya memberikan hak untuk diundi semasa pilihanraya MP. Hak untuk diundi semasa pilihanraya atau dipilih untuk jawatan dalam MP dan satu parti politik bukan hak asasi. Dalam perkataan lain, perayu tidak mempunyai hak asasi untuk menjadi ahli MP yang merupakan satu jawatan undian. Oleh itu apabila be;iau digugurkan daripada menjadi ahli MP setelah mengambil jawatan Naib Presiden PRM, persoalan tentang hak perlembagaan beliau tidak terjejas (lihat perenggan 22). Oleh itu, hak yang diberikan oleh perkara 10(1)(c) untuk membentuk persatuan secara tersirat memberi hak untuk menjadi ahli persatuan, tetapi bukan hak untuk menguruskan satu persatuan (iaitu dengan menjadi ahli MP bertentangan berbanding dengan menjadi ahli MP) (lihat perenggan); ewan Undangan Negeri Kelantan v Nordin Salleh [1992] 1 MLJ 697 dibeza. Meskipun dengan beranggapan sejenak bahawa terdapat sekatan

terhadap hak perayu, sekatan tersebut jelas dibenarkan oleh peruntukan fasal 2(c) perkara 10 (lihat perenggan 25).

(3) Penelitian kepada perkara 10(1) yang bermula dengan '1) Subject to cl (2), (3) and (4)' — jelas menunjukkan bahawa semua hak yang disebutkan bukan hak mutlak kerana ia bersyarat oleh fasal-fasal yang disebutkan di atas. Dalam kes perkara 10(1)(c) yang berkaitan hak semua warganegara untuk membentuk persatuan, PP, dalam perkara 10(2)(c) memberikan kuasa kepada Parlimen untuk mengenakan sekatan tertentu yang difikirkan sesuai demi kepentingan keselamatan Negara, keselamatan awam atau sikap moral. Peruntukan statutori yang dipersoalkan sememangnya undang-undang yang mengenakan sekatan tersebut (lihat perenggan 31).Oleh itu, meskipun peruntukan statutori yang dipersoalkan berdanggah dengan perkara 10(1)(c) (yang mana mahkamah tidak bersetuju), sekatan itu terangkum dalam skop fasal (2)(c) perkara 10. Dalam perkataan lain, peruntukan statutori yang dipersoalkan itu, yang sendirinya satu sekatan yang dibenarkan di bawah perkara 10(2)(c), bukan suatu yang tidak berperlembagaan (lihat perenggan 62).

(4) Objektif Akta dan peruntukan statutori yang dipersoalkan itu memadai kaitannya dan selaras dengan tujuan 'in the interest of morality' yang disebut dalam fasal (2) perkara 10. Selagi ia boleh ditunjukkan bahawa peruntukan statutori yang dipersoalkan digubal atau diluluskan bagi satu tujuan berkaitan dengan moral tanpa perlu menunjukkan bahawa ia hendaklah mengekalkan moral itu, ia telah digubal dengan sah (lihat perenggan 37). Berhubung perkataan 'morality' itu sendiri, ia hendaklah diberikan maksud yang luas, liberal dan ekstensif, yang melebihi nilai baik. Namun, dalam ketiadaan apa-apa definisi perkataan 'morality' dalam PP ia patut diberikan maksud biasa (lihat perenggan 38). Moral itu mempunyai kesan tafsiran yang lebih luas memandangkan etika meliputi hampir keseluruhan aspek perlakuan manusia (lihat perenggan 39).

(5) Dengan menggunakan pendekatan 'purposive', peruntukan statutori yang dipersoalkan dlaam Akta adalah untuk memastikan perlunya ada MP yang bebas daripada pengaruh politik dan oleh itu mengelakkan berlakunya keadaan konflik kepentingan (lihat perenggan 48). Pengecualian ahli yang memegang jawatan dalam parti politik adalah untuk mengelakkan MP daripada digunakan sebagai pelantar politik atau untuk mengelakkan pengaruh politik yang mungkin mendesak terhadap satu badan berasingan yang mempunyai tugas untuk menegak dan mengekalkan objektif sebagaimana yang dinyatakan dalam Akta (lihat perenggan 56). Kedudukan perayu tidak diragui akan membawa kepada persoalan kemungkinan potensi beliau yang tidak berbelah bagi dalam melaksanakan tugas dan tanggungjawabnya sebagai ahli MP. Selagi beliau terus berkhidmat dan memegang jawatan dalam parti politik pasti akan timbul syak wasangka bahawa apa-apa polisi yang digunakan oleh MP adalah pengaruh daripada agenda parti politik (lihat perenggan 59).

Notes

For cases on freedom of association, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1786–1787.

For cases on the Malaysian Bar, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1683–1685.

Cases referred to

Chor Phaik Har v Farlin Properties Sdn Bhd [1994] 3 MLJ 345 (refd)
Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi [1981] 1 MLJ 29 (refd)
Datuk Haji Harun bin Hajii Idris v Public Prosecutor [1977] 2 MLJ 155 (refd)
Dewan Undangan Negeri Kelantan v Nordin Salleh [1992] 1 MLJ 69 (distd)
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11 (refd)
Government of Malaysia & Ors v Loh Waf Kong [1979] 2 MLJ 33 (refd)
Hinds v The Queen [1976] 1 All ER 353 (refd)
Hokkien Cemeteries, Penang v Majlis Bandaran Pulau Pinang [1979] 2 MLJ 121 (refd)
Jamuna Prasad v Lachhi Ram AIR 1954 (refd)
K Suryanarayana v WG Co-op, Sugars Ltd AIR 1976 (refd)
Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2004] 4 MLJ 1 (refd)
Lembaga Tataterib Perkhidmatan Awam Hospital Bosar, Pulau Pinang v Utra Badi [2001] 2 MLJ 417 (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)
Madhavan Nair & Anor v Public Prosecutor [1975] 2 MLJ 264 (refd)
Malaysian Bar v Government of Malaysia & Anor [1986] 2 MLJ 225 (refd)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165 (refd)
Mamat bin Daud v Government of Malaysia [1988] 1 MLJ 299 (refd)
Minister of Home Affairs v Fisher [1979] 3 All ER 21 (refd)
Mohd Ezam b Mohd Noor v Ketua Polis Negara and 4 other appeals [2002] 4 AMR 4053 (refd)
PP v Param Cumaraswamy (No 2) [1986] 1 MLJ 518 (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566 (refd)
PP v Soon Seng Sia Heng [1979] 2 MLJ 170 (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72 (refd)
Ramiji Lai Modi v State of UP [19xx] x MLJ xxx (refd)
Su Ah Ping v PP [1980] 1 MLJ 75 (refd)

Legislation referred to

Constituion of India 19(1)(a)
Courts of Judicature Act 1964 s 42
Legal Profession Act 1976 s 46A(1)(c)(ii), 47
Legal Profession (Practice and Etiquette) Rules 1978 r 5
Federal Constitution arts 5(4), 8(1), (2), 10(1)(c), (2)(c), 74, 75, Part II
Interpretation Acts 1948 and 1967 s 17A
Penal Code s 298A
Representation of the People Act 1952 ss 123(5), 124(5)

Tommy Thomas (Michelle Lee with him) (Tommy Thomas) for the appellant.
Bastian Vendargon (Hamid Sultan with him) (Hamid Sultan Loga Chitra & Associates) for the first respondent.
Alice Loke Yee Ching (Siti Nur Ikhlas with her) (Attorney General's Chambers) for the second respondent.

Alauddin JCA (delivering judgment of the court):

INTRODUCTION

[1] By way of a notice of motion dated 31 January 2002, the appellant applied for judicial review wherein he sought the following orders:

(a) a declaration that, notwithstanding the appellant's appointment as Vice President of Parti Rakyat Malaysia ('PRM') on 14 July 2001, he is not disqualified from being a member of the Bar Council ('BC') 2001–2002; and

(b) declaration that, notwithstanding the appellant continuing to hold the office of Vice President of PRM, he is not disqualified from offering himself as a candidate for election to the BC 2002–2003 and in subsequent years; and

(c) in the event it becomes necessary for amendments to be made to these declarations, the appellant shall seek leave of the court at the appropriate time to move for the addition of the following declarations:

(i) a declaration that s 46A(1)(c)(ii) ('the impugned statutory provison') of the Legal Profession Act 1976 ('the Act') is inconsistent with the Federal Constitution ('FC') and is in consequence void; and

(ii) a declaration that, notwithstanding his holding of the office of Vice President of PRM, the appellant is entitled to take office and serve as a member of the BC 2002–2003 and, if elected, in subsequent years.

[2] The grounds upon which this application is made are set out in the supporting statement and are as follows:

(a) The impugned statutory provision in purporting to:

(i) disqualify the appellant from being a member of the BC 2001–2002;

(ii) disqualify the appellant from offering himself as a candidate for election by postal ballot in October/November 2001 for membership of the BC 2002–2003 and in subsequent years, is unconstitutional by reason of the breach of the fundamental rights of the appellant entrenched in Part II of the FC;

(b) The impugned statutory provision is contrary to the appellant's right to freedom of association enshrined in art 10(1)(c);

(c) The impugned statutory provision is in breach of the equality provisions of art 8(1);

(d) The impugned statutory provision results in unfair discrimination of the appellant contrary to art 8(2);

(e) The impugned statutory provision has the effect of depriving or impinging on his personal liberty contrary to art (1); and

(f) The appellant's said fundamental freedoms are directly affected or the effect or consequence on the said fundamental rights by the impugned statutory

provision is to make their exercise ineffective or illusory because the appellant is not permitted to hold the office of Vice President, PRM and the office of member of the BC simultaneously.

[3] This application was dismissed by the learned High Court judge sitting at Kuala Lumpur on 17 July 2002.

[4] It is against the above order that the appellant now appeals to this court.

FACTUAL BACKGROUND

[5] The facts in these proceedings are not in dispute. They are:

(i) The appellant is an Advocate and Solicitor of the High Court of Malaya, having been called to the Malaysian Bar ('MB') in June 1987. He has been in continuous practice since his call;

(ii) In the years 1997 and 1998, he was elected to serve as the Kuala Lumpur Bar State Representative on the BC. In both years, he was elected by members of the Kuala Lumpur Bar;

(iii) The appellant stood for the first time in October 1998 for election by postal ballot to be cast by all the members of the MB and was duly elected to the BC in November 1999 and in two succeeding years, 2000 and 2001;

(iv) In May 1999, the appellant joined a political party, PRM as an ordinary member;

(v) On 14 July 2001, the appellant was elected Vice President of PRM; and

(vi) In November 2001, the appellant was again elected by way of postal ballot to serve on the BC 2002–2003.

GROUNDS OF APPEAL

[6] Before us, the learned judge's decision was attacked on the following grounds:

(i) The learned judge erred in law in determining that the disqualification of the appellant from simultaneously holding the office of a member of the BC and the office of Vice President, PRM, by reason of the impugned statutory provision, did not affect his fundamental freedom of association enshrined in art 10(1)(c) of the FC. (ii) The learned judge was wrong in law in holding that there is no inconsistency between the impugned statutory provision and art 10(1)(c) of the FC.

(ii) The learned judge misdirected himself in law when he held that the impugned statutory provision did not have a 'direct effect or consequence' on the exercise of the appellant's right to association as laid down by the Supreme Court in the case of *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1 MLJ 697.

(iii) The learned judge was wrong in law in holding that the constitutionally protected freedom of association does not extend to or cover the right of a member of an association to:

(a) lead;

(b) manage its affairs or business; or

(c) hold office therein.

(iv) The learned judge erred in law in holding that the impugned statutory provision did not impinge on the appellant's 'life and personal liberty' within the meaning of art 5 of the FC.

(v) That in all the circumstances of the case the learned judge was wrong in dismissing the appellant's application for judicial review.

[7] Learned counsel for the first respondent fully supported the appellant's appeal and submitted that the primary issue i.e. whether the impugned statutory provision offends arts 10(1)(c) and/or 5 of the FC and should therefore be struck down by virtue of art 4, as being null and void should be answered in the affirmative.

[8] In support of his submission learned counsel relied on the following authorities:

(i) *Dewan Undangan Negeri Kelantan v Nordin bin Salleh*;

(ii) *Mohd Ezam b Mohd Noor v Ketua Polis Negara and 4 other appeals* [2002] 4 AMR 4053;

(iii) *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170;

(iv) *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75;

(v) *Hinds v The Queen* [1976] 1 All ER 353 at p 359;

(vi) *Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi* [1981] 1 MLJ 29; and

(vii) *Minister of Home Affairs v Fisher* [1979] 3 All ER 21.

[9] The learned Senior Federal Counsel ('SFC') who appeared for the second respondent strongly opposed the appellant's appeal.

[10] In support of the learned judge's decision the learned SFC submitted that the appellant's contention that the impugned statutory provision is contrary to arts 5 and 10(1)(c) of the FC cannot be maintained and this appeal should be dismissed.

COURTS FINDINGS

[11] Although several grounds of appeal were raised by the appellant we feel they can be broadly summarised as one main issue, ie whether the impugned statutory provision is inconsistent with artss 10(1)(c) and 5 of the FC. That really is the crux of the matter.

A **[12]** We will begin by first, referring to the impugned statutory provision which reads as follows:

> 46A Disqualification for membership of the Bar Council, a Bar Committee, or of any committee thereof.
>
> **B** (1) A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee —
>
> (a) ; or
>
> (b) ; or
>
> (c) if he holds any office in:
>
> **C** (i) …; or
>
> (ii) any political party, or
>
> (iii) ….

D **[13]** We shall now refer to art 10(1)(c) and (2)(c) which reads as follows:

> 10(1) Subject to Clauses (2), (3) and (4) —
>
> (a) …;
>
> (b) …;
>
> **E** (c) all citizens have the right to form associations.
>
> (2) Parliament may by law impose —
>
> (a) …
>
> (b) …
>
> **F** (c) the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

[14] Now, with regard to art 10 (1)(c), our view is that the question of freedom of **G** association does not arise at all and therefore the inconsistency between the impugned statutory provision and art 10(1)(c) of the FC does not exist.

[15] The right to form association under art 10(1)(c) does not arise because the right guaranteed therein is the ordinary right which is enjoyed by all citizens **H** including the appellant to form associations. It bears no reference to a right which is conferred by a particular statute, ie the Act, to serve as a member of the BC, a body which is the creation of the Act itself (see *Basu's Commentary on the Constitution of India* (7th Ed, 1992) Vol C/1 p 64).

I **[16]** In *VN Shukla's Constitution of India* (7th Ed) by OK Singh at p 87, the writer says:

> The right to form association implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interest.

[17] In *K Suryanarayana v WG Co-op, Sugars Ltd* AIR 1976 (Vol 63 at p 340) the Full Bench of the High Court of Andhra Pradesh held that in the case of a right created by statute, art 19(1)(c) (in pari materia with our art 10 (1)(c)) would not be attracted at all. Hence, the question of unconstitutionality of any restriction imposed by the said statute does not arise.

[18] The BC is a creature of the Act (see s 47). Applying the above principle, the right to form the BC arises from the Act and therefore any rights, benefits or privileges conferred by the Act can also be restricted by the Act without in any way contravening art 10.

[19] Also on the ground that the BC is a creature of the Act, the question about the right to form association under art 10(1)(c) again does not arise. Hence any conditions imposed by the Act (in this case, the impugned statutory provision) would not amount to a violation of the right to form an association guaranteed under art 10(1)(c).

[20] Faced with the issue whether ss 123(5) and 124(5) of the Representation of the People Act 1952 is ultra vires art 19(1)(a) of the Constitution of India (in pari materia with our art 10(1)(a)), the Supreme Court in *Jamuna Prasad v Lachhi Ram* AIR 1954 (Vol 41) at p 687 had this to say:

> The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The fundamental rights chapter has no bearing on a right like this created by statute. Persons have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. These sections are intra vires.

[21] The BC is indeed the executive arm of the MB. It is a creature of the Act, created for the purpose of managing the affairs of the MB. Salleh Abbas LP (as he then was) in*Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165 had this to say (at p 166):

> The first appellant, the Malaysian Bar, is a body corporate created under s 41 of the Legal Profession Act 1976 ('the Act') with a number of stated objects and powers. All lawyers upon being admitted to practise as advocates and solicitors automatically become members of the first appellant (s 43 of the Act). The management of the affairs of the first appellant is entrusted to a Council, known as the Bar Council (s 47 of the Act).

[22] It will not be difficult to glean from the above that 'association' within the meaning of the word association in art 10 to which the members of the legal profession belong, including the appellant, is the MB. All lawyers admitted to practise as advocates and solicitors have a right to become members of the MB. However, not all members have a right to be a member of the BC. To assume a post in the BC, a member will have to be elected under procedures laid down in the Act. The Act does not confer on the appellant a right to be a member of the BC. It only confers a right to stand for election to the BC. The right to stand for election or to be elected to the office of the BC and a political party is not a fundamental right.

A In other words, the appellant does not have the fundamental right to be a member of the BC which is an elected post. Therefore when he was disqualified from being a member of the BC upon assuming the post of Vice President of PRM these was no question of his constitutional right being affected.

B **[23]** A similar argument based on art 10 was raised by the appellant in *Malaysian Bar v Government of Malaysia & Anor* [1986] 2 MLJ 225. In rejecting the contention of the Appellant that the right of association had been violated Harun J (as he then was) had this to say (at p 228):

C > There is no merit in this argument either because art 10(1)(c) does not give any right to any citizen to manage any association but merely the right to form associations: *Azeez Basha v Union of India*.

D However on appeal to the Supreme Court the appellant abandoned the same argument. So, to reiterate, the right conferred by art 10(1)(c) to form association implies the right to be a member of the association, but not the right to manage the association (ie by being a member of the MB as opposed to being a member of the BC).

E **[24]** As we have stated earlier both learned counsel for the appellant and first respondent relied heavily on *Nordin Salleh*'s case. We must say right away that the facts in that case are clearly distinguishable with the facts of the case before us. We have here a different fact situation. What was decided in *Nordin Salleh*'s case is this — that freedom to form association includes freedom to disassociate, holding that it is an integral part of the right in art 10. What we have here is quite different. The

F appellant here is not asking to disassociate but rather he wants to associate with both. Unlike in *Nordin Salleh*'s case where several individuals voluntarily form a political party, in our case the BC was created by the Act.

G **[25]** We hasten to add that even assuming for a moment that there appears to be a restriction on the appellant's right, in our judgment the restriction is clearly permitted by the provisions of cl (2)(c) of art 10.

H **[26]** In furtherance of what we have stated above, we must categorically emphasise here that the effect of the impugned statutory provision which outlines the disqualification of the members of the BC, does not in any way constitute a violation of the protected fundamental right since the right of being a member of the BC is in itself not a protected right under art 10(1)(c). Further, there is no provision that could possibly impinge on the appellant's right to join or associate himself with the MB by being a member of it.

I **[27]** If we were to look around we will find that there is no dearth of authorities in our courts concerning presumption in favour of constitutionality of a particular piece of legislation. In such cases the burden is always upon him who attacks it to show that there has been a clear transgression of constitutional principles.

[28] A clear illustration of the applicability of such presumption is to be found in the case of *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 where Hashim Yeop A. Sani (as he then was) had this to say (at p 130):

> law, the first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute and then to see whether a classification has been made and which does not result in a real or actual discrimination. In its approach to the problem the court ought prima facie, to lean in favour of constitutionality and should support the legislation if it is possible to do so on any reasonable ground and it is for the party who attacks the validity of the legislation to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable.

And further down his Lordship continued:

> (10) Finally on the presumption of constitutionality a legislation is not to be struck down as discriminatory if any state of facts may reasonably be conceived to justify it. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the time's and may assume every state of facts which can be conceived as existing at the time of the legislation.

[29] The case of *Datuk Haji Harun bin Hajii Idris v Public Prosecutor* [1977] 2 MLJ 155 saw a further illustration of the applicability of the same principle. After having summarised the relevant principles that can be deduced from Indian authorities cited in the course of proceedings, Suffian LP (as he then was) had this to say (at p 166):

> 9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy (per Sastri CJ in *Anwar Ali*).

[30] In view of the presumption of constitutionality in favour of the impugned statutory provision and the appellant's failure to show otherwise the inevitable conclusion would be that the impugned statutory provision is valid and constitutional.

[31] Earlier in our judgment we did briefly refer to art 10(2)(c) (see para 25 above). We will now say a bit more on art 10(2). A close scrutiny of art 10(1) which begins with '(1) Subject to cll (2), (3) and (4)' — clearly reveals that all the rights mentioned therein are not absolute rights because they are qualified by the clauses mentioned above. In the case of art 10(1)(c) which deals with the right of all citizens to form association, the FC, in art 10(2)(c) authorizes Parliament to impose certain restrictions as it deems necessary in the interest of either the security of the Federation, public order or morality. The impugned statutory provision is indeed the law imposing such restrictions.

[32] Unlike the Indian Constitution, the word 'reasonable' appearing before 'restriction' is not to be found in our art 10(2)(c). In India the courts would be under a duty to decide on its reasonableness. In Malaysia, the words 'necessary' and 'expedient' are preferred. 'The words 'necessary' and 'expedient' are the antithesis of

the word 'reasonable'. They show that the underlying idea is to make Parliament the final judge of what restrictions to impose. The extent, nature or scope of the restriction is for Parliament (ultimately, the Executive) and not for the court to decide' (see *Halsbury's Laws of Malaysia* Vol 2, p 164).

[33] In examining the provisions of art 10(2)(a) in *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264, Chang Min Tat J (as he then was) had this to say (at p 266):

> Clause 2(a) speaks of restrictions deemed 'necessary or expedient in the interest of the security of the Federation' and restrictions 'designed … to provide against incitement to any offence.' Where such entirely subjective words have been used, it is not within the competency of the courts to question the necessity or expediency of the legislative provision.

[34] Faced with the same issue, the Supreme Court in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 speaking through that learned judge Edgar Joseph Jr SCJ (as he then was) had this to say (at p 575):

> But, with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10 (2)(a), the question whether it is reasonable does not arise; the law would be valid.

Further down in the judgment (at p 579) his Lordship continued:

> In other words, the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10(2)(a). The connection contemplated must be real and proximate, not far-fetched or problematical.

[35] A further illustration of the application of the above principle is to be found in the case of *Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 299 where the Supreme Court adopted the 'in pith and substance' test to ascertain whether s 298A of the Penal Code is ultra vires arts 74 and 77 of the FC. Speaking through that distinguished judge, Mohamed Azmi SCJ (as he then was) the court (in a majority decision) said:

> In determining whether s 298A, in pith and substance, fall within the class of subject matter of 'religion' or 'public order', it is the substance and not the form or outward appearance of the impugned legislation which must be considered.
>
> The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs.

[36] We shall now move on to consider the next relevant issue, ie whether the Act was legislated 'in the interest of morality'. The phrase 'in the interest of' has been given a liberal interpretation by judicial authorities. In *Public Prosecutor v Param*

Cumaraswamy (No 2) [1986] 1 MLJ 518, the High Court after having referred to the Indian authority of *Ramiji Lai Modi v State of UP* interpreted the phrase 'in the interest of' in the following terms:

> From the passage which I have read, we can clearly see that the constitutional provisions allow the state to impose restrictions in the interest of public order which has a wider ambit than for the maintenance of public order. This is because a law may not have been designed to maintain public order and yet it may have been enacted in the interest of public order. Similarly, a law may not have been designed to prevent incitement to violence and yet it may have been enacted in the interest of security. Put it another way, a law would still be in the interest of security or public order without having to make it a law for the prevention of violence or public disorder.

[37] Relying on the above passage we would say that the object of the Act and therefore the impugned statutory provision is sufficiently connected and in line with the 'in the interest of morality' purpose mentioned in cl (2) of art 10. So long as it can be shown that the impugned statutory provision is enacted or passed for a purpose related or connected to morality without having to show that it is to maintain morality, it is validly enacted.

[38] As to the word 'morality' itself, we would subscribe to the view that it be given a broad, liberal and extensive meaning, may be wider than merely good values. However, in the absence of any definition to the word 'morality' in the FC it should be given its ordinary meaning. Judicial authority for this proposition can be found in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Bosar, Pulau Pinang v Utra Badi* [2001] 2 MLJ 417 where Abdul Malek Ahmad FCJ (as he then was) in relation to the issue of the right to be heard, expressed thus:

> The word 'heard' in cl 2 of art 135 of the Constitution and in para 27 of Cap D is derived from the word 'hear' which is not defined in the constitution which governs this matter; in view of that we think that it should be given its ordinary everyday meaning.

[39] In order to know its ordinary meaning, reference is made to the *New Shorter Oxford English Dictionary on Historical Principles* by Lesley Brown Volume 1 which defines morality to include:

> The doctrine or branch of knowledge that deals with right and wrong conduct and with duty and responsibility; moral philosophy, ethics.' (see also *Black's Law Dictionary* (7th Ed) p 1025).

Morality therefore has a wider import of interpretation since ethics cover almost every aspect of the human conduct. Negative essence, for instance, being partial in adjudicating a dispute, is considered unethical and wrong. The quality of being impartial and independent has always been the trademark of the legal fraternity (see for example r 5 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that no advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

[40] In giving a wide meaning to the word 'morality' in *Manohar v State of Maharashtra* AIR 1984 Bombay 47, the learned judge held (at p 57):

> The word 'morality' has not been defined in the Constitution. To our mind, morality contemplated by cl (4) of art 19 is in the nature of public morality and it must be construed to mean public morality as understood by the people as a whole.

Further in the judgment his Lordship continued:

> In *Brij Gopal's case* (AIR1979 Madh Pra 173), the Madhya Pradesh High Court held that the word 'morality1 which occurs in cll (2) and (4) of art 19 means ideas about right and wrong which are accepted by the right thinking members of the society as a whole of the country. While recognising that 'morality' is a fluid concept, and its content will depend upon the time, place and stage of civilization, the court rejected the contention that the word 'morality' in art 19 should be restricted to sexual morality. We are in respectful agreement with the view taken by the Madhya Pradesh High Court that the word 'morality' occurring in art 19(4) is not restricted to sexual morality.

[41] Both learned counsel for the appellant and the first respondent in their submissions contended that the impugned statutory provision also violated art 5 (1) which reads as follows:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[42] The issue of personal liberty mentioned in art 5(1) was specifically dealt with by the Federal Court in *Government of Malaysia & Ors v Loh Waf Kong* [1979] 2 MLJ 33. In that case, the respondent applied for an order directing the appellant to issue a Malaysian passport to him. He contended that he had a fundamental right to travel abroad and that the refusal of a passport violated this right. The learned judge rejected the application but held in effect that the refusal or delay in granting a passport was tantamount to preventing the appellant from leaving the country and was in violation of his right of personal liberty under art 5(1) of the FC. The appellants appealed to the Federal Court.

[43] In delivering the judgment of the Federal Court, Suffian LP (as he then was) had this to say (at p 34):

> It is well-settled that the meaning of words used in any portion of a statute - and the same principle applies to a constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing 'personal liberty' in art 5(1) one must look at the other clauses of the art, and doing so we are convinced that the art only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being 'unlawfully detained'; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. Indeed freedom of movement is dealt with specifically in art 9 which, however,

only guarantees the citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and the reside anywhere therein.

[44] The same principle was followed in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.

[45] In the light of the interpretation of personal liberty in both cases mentioned above, we fail to see how the impugned statutory provision impinges or deprives the appellant of his personal liberty contrary to art 5(1).

[46] Section 17A of the Interpretation Acts 1948 and 1967 provides:

17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[47] The provision of s 17A above is what is normally referred to as the 'purposive approach' in statutory interpretation. The same approach was adopted by the Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2004] 4 MLJ 1 and *Hokkien Cemeteries, Penang v Majlis Bandaran Pulau Pinang* [1979] 2 MLJ 121.

[48] Applying the purposive approach in this appeal before us, we find that the impugned statutory provision in the Act is to ensure the need for an independent BC free from political influence and thus preventing a potential conflict of interest situation.

[49] In this regard, a knowledge of the matters considered by the legislature in adopting the impugned statutory provision is relevant. Further, it is permissible for the courts, as held by the Federal Court in *Chor Phaik Har v Farlin Properties Sdn Bhd* [1994] 3 MLJ 345 to resort to the Handsard as an aid to interpretation. We can therefore look at the policy speech of the then Minister of Law when tabling the Bill to amend the Act during the second reading before the Upper House of Parliament on 9 January 1978.

[50] The Honourable Minister in addressing the members of the House cited several reasons for the amendment. One of the reasons was the attempt by several members of the MB who were also active politicians, to influence members of the legal profession against representing ISA detainees. The impugned statutory provision seeks to prevent a politician who holds office in a political party from acting in a manner which would bring his public duties 'as a member of the BC' into conflict with his political interest.

[51] The Honourable Minster also emphasized the need for an independent BC free from political influence and whose functions were to be confined only to matters related solely to the profession.

[52] Reverting to the appeal at hand, a pertinent fact to note here is that there is no legal impediment as such for the appellant to become a member of a political party but merely to hold office in that party. Clearly, what Parliament was concerned about was that a member of the BC holding an influential position vis-a-vis the MB, should not also hold office of a political party which is also an influential position in the political arena. Hence, the enactment of the impugned statutory provision.

[53] The judgment of Harun J (as he then was) in *Malaysian Bar v Government of Malaysia & Anor* explains the object of the impugned statutory provision thus:

> In the first place, I think, s 46 A read as a whole is a provision prescribing the disqualification for membership of the Bar Council and Committees. The object is clearly that the affairs of the Bar be managed by members of the legal profession who are not only professionally independent but appear to the outside world to be so. The emphasis is an independent Bar which is not subject to external influences of a non-professional character. Hence the provision that lawyers who are members of Parliament, or any of the State Legislatures or local authorities; or hold office in any trade unions or political party or organisations of a political nature are disqualified from holding office in the Bar Council or Committees. These provisions (sub-s 46A(1)(b) and (c) apply to all lawyers and are therefore, not discriminatory.' (see also *The Law of Advocates and Solicitors in Singapore and West Malaysia* (2nd Ed) by Tan Yock Hin at p 189).

[54] We would also like to refer to the judgment of Mohamed Azmi SCJ (as he then was) in *Malaysian Bar v Government of Malaysia & Anor* where his Lordship inferred the real object of the Act to be thus (at p 171):

> I am satisfied that by s 46A (1)(a) Parliament intends to ensure, having regard to the heavy responsibilities of the Council and Committees imposed by ss 42 and 72, that the governing body of the legal profession should be effectively and independently run by —
>
> (a) persons of considerable experience in the legal profession;
>
> (b) persons who are not members of the legislature;
>
> (c) persons who are not active in politics or trade union.

[55] In the light of the above decisions we would reiterate that the BC entrusted with the responsibility as a governing body of the legal profession consisting of some 10,000 members should consist of members who are professionally independent and responsible.

[56] The exclusion of members who hold office in a political party is to avoid the BC from being used as a political platform or to prevent the possible exertion of political influence upon an independent body whose task is to uphold and maintain the objectives as prescribed by the Act.

[57] If the appellant is allowed to hold office in a political party whilst at the same time being a member of the BC it is feared that his political position may be used to influence the decisions of the BC. In doing so, he acts contrary to what the Act was designed to achieve. It is undoubtedly clear to us that the said impugned statutory provision was enacted in order to prevent a potential conflict of interest situation (see P Ramanatha Aiya's *The Law Lexicon with Legal Maxims, Latin Terms and Words and Phrases* (2nd Ed, 1997) at p 383). A B

[58] As a member of the BC, the appellant is deeply involved in the management of the affairs of the MB. It is important that, the appellant, as a member of the BC, in discharging his duties and responsibilities must not only be totally free from bias but also be seen to be divorced from any motive (political or otherwise) other than to serve and advance those objectives stated in the Act. In this connection it is pertinent to note the extensive powers of the BC conferred by ss 56 and 57 of the Act. C

[59] The position of the appellant in assuming the dual office both as a member of the BC and a political party will no doubt bring into question the likelihood of his potential impartiality in discharging his duties and responsibilities as a member of the BC. As long as he continues to serve and hold office in a political party there would invariably arise a suspicion that any policy adopted by the BC could be influenced by the agenda of the political party. D E

[60] Whether or not the BC may actually be influenced is irrelevant. But it should not be placed in a position where suspicion may arise. Similarly, the issue is not whether there will be an actual conflict of interest but that it must not be perceived that a potential conflict of interest may arise. Matters pertaining to conflict of interest deal with right and wrong conduct as well as ethics and therefore it touches upon morality, an aspect which the impugned statutory provision is concerned about. F

[61] Reference was also made to art 4 of the FC by both learned counsel for the appellant and the first respondent in their submissions. Their allegation is that the impugned statutory provision in so far as it purports to prohibit the appellant from holding two positions simultaneously in two associations is ultra vires arts 5(1) and 10(1)(c) and is accordingly void under art 4 and it should therefore be struck down. G

[62] The short reply to this is that even if the impugned statutory provision offends art 10(1)(c) (which we do not agree), the restriction comes well within the purview and scope of cl (2)(c) of art 10. In other words, the impugned statutory provision, being itself a restriction permissible under art 10(2)(c), cannot be unconstitutional. H

[63] After hearing submissions on behalf of all the parties appearing before us concerning the impugned statutory provision, we are inclined to take the view that it is not only constitutional but consistent with the FC. Even if we perceive otherwise, the decision in *Public Prosecutor v Pung Chen Choon* makes it abundantly clear that the courts ought to lean in favour of constitutionality. The Supreme Court in its judgment at p 571 of the report said: I

A But we hasten to add that we adhere to the principle enunciated by the Supreme Court of India in *Kader Nath Singh v Bihar*, that it is well settled that if certain provision of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional the court would lean in favour of the former construction.

B

[64] Before we conclude this judgment we feel it is pertinent and appropriate at this point of time to reflect upon the observation made by Raja Azlan Shah FJ (as His Highness then was) when considering the issue of whether the amendment to art 5(4) of our Constitution was constitutional in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at pp 188 and 189:

C

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544, at p 551. Each country frames its Constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

D

[65] For the reasons we have already stated above we find that there are no merits in this appeal. In the result, we would dismiss this appeal with costs. The deposit is to go to the second respondent to account of taxed costs.

E

[66] We must add by way of postscript that this appeal was heard by a bench of this court which included our learned brother Ariffin Jaka JCA who has since retired. This judgment is accordingly delivered pursuant to s 42 of the Courts of Judicature Act 1964 as amended.

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[67] I have shown this judgment in draft to my learned brother Mokhtar Sidin JCA and he has expressed his agreement with it.

G

Appeal dimissed with costs.

Reported by Loo Lai Mee

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